FILED
JUL 17 1995

95-101

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1995

BARBARA ANDERSON, Ph.D.
Petitioner

VERSUS

CUNARD LINE LIMITED
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the actions of the Fifth Circuit Court of Appeals, in denying Petitioner's Petition for Writ of Mandamus, impermissibly allow or permit the District Court to assert federal jurisdiction in a Jones Act case in violation of the saving-to-suitors clause?

2. Did the actions of the Fifth Circuit Court of Appeals, in denying Petitioner's Petition for Writ of Mandamus, impermissibly allow or permit the District Court to use an inappropriate standard of review in analyzing defendant's assertion of fraudulent pleading?

3. Did the actions of the Fifth Circuit Court of Appeals, in denying Petitioner's Petition for Writ of Mandamus, impermissibly allow or permit the District Court to deny Plaintiff/Petitioner's Motion for Remand?

LIST OF PARTIES

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TABLE OF CONTENTS

Page

Issues Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Decisions Below 1

Statement of Jurisdiction 1

Statute Presented for Review 1

Statement of the Case 3

Summary of Argument 3

Argument 4

Conclusion 11

Appendix A -

Appellate Opinion in this Matter A-1

Appendix B -

Order Denying Plaintiff's Motion to Remand and Granting Defendant's Motion to Transfer, of the United States District Court, Eastern District of Louisiana A-2

TABLE OF AUTHORITIES

CASES **Page**

Caleshu v. Wangelin, 549 F.2d 93 (8th Cir. 1977) 6

Commonwealth of Penn. v. Newcomer, 618 F.2d 246, 248 (3rd Cir. 1980) 5

In Re Evans, 524 F.2d 1004 (Miss. 1975) 5

In Re Justices of the Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982) 5

Kidd v. Southwest Airlines Co., 891 F.2d 540, 542 (5th Cir. 1990) 6

Lackey v. Atlantic Richfield Co., 990 F.2d 202, 206 (5th Cir. 1993) 7

Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116, 117 (5th Cir. 1987) (en banc) 6

Plekowski v. Ralston-Purina Co., 557 F.2d 1818 (5th Cir. 1977) 5

Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, 689 F.2d 982 (11th Cir. 1982) 6

Sachs & Co. v. Edelstein, 494 F.2d 76 (N.Y. 1974) 5

TABLE OF AUTHORITIES (continued)

CASES **Page**

Sunshine Beauty Supplies v. United States District Court for the Central District of Calif., 872 F.2d 310 (9th Cir. 1989) 6

Town of North Bonneville, Washington v. United States District Court, Western District of Washington, 732 F.2d 747 (9th Cir. 1984) 5

York v. Horizon Federal Savings & Loan Association, 712 F.Supp. 85, 87 (E.D. La. 1989) 6

DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reproduced in the appendix of this Petition.

STATEMENT OF JURISDICTION

The Judgment (opinion) of the Court of Appeal was entered on April 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1). Jurisdiction in the Trial Court was allegedly based on diversity of citizenship of the parties (28 U.S.C.A. Section 1332) when Defendant/Respondent removed this matter from Louisiana state court to the United States District Court for the Eastern District of Louisiana.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

28 U.S.C.A. Section 1333:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Rule 21 of the Rules of Appellate Procedure:

> Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs
>
> (a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing. Petition for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.
>
> (b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also

be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The Clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

STATEMENT OF THE CASE

This petition arises out of a ruling by the Fifth Circuit Court of Appeals which denied Plaintiff/Petitioner's Petition for Writ of Mandamus. The original suit was filed as a Jones Act action in the Louisiana Civil District Court for Orleans Parish and removed by the Defendant/Respondent based on diversity or citizenship of the parties and the alleged fraudulent nature of the Jones Act claim.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit Court of Appeals, which denied Petitioner's Petition for Writ of Mandamus, allowed or permitted the District Court to assert federal jurisdiction over a Jones Act claim in violation of the saving-to-suitors clause.

2. The Fifth Circuit Court of Appeals erred in refusing to grant Petitioner's Petition for Writ of Mandamus, which action allowed the District Court to exceed the lawful exercise of its lawful jurisdiction.

3. The Fifth Circuit Court of Appeals erred in refusing to grant Petitioner's Petition for Writ of Mandamus, which allowed the District Court to use an inappropriate standard of review in analyzing defendant's assertion of fraudulent pleading.

4. The Fifth Circuit Court of Appeals erred in refusing to grant Petitioner's Petition for Writ of Mandamus, which allowed the District Court to erroneously deny Plaintiff/Petitioner's Motion for Remand.

ARGUMENT

On November 18, 1994, Plaintiff/Appellant Barbara Anderson filed an action in Civil District Court for Orleans Parish, contending that she was injured aboard defendant's vessel, the M/V VISTAFJORD, on May 14, 1994, and seeking recovery under the Jones Act and general maritime law. On January 20, 1995, defendant removed this case to the United States District Court for the Eastern District of Louisiana, on the basis of diversity of citizenship, arguing that plaintiff's claim of Jones Act status was fraudulently made. Plaintiff thereafter filed a Motion to Remand, denying defendant's assertion of fraud, while defendant filed motions to transfer to the United State District Court for the Southern District of New York, or for dismissal.

The District Court subsequently denied plaintiff's Motion to Remand, denied defendant's Motion to Dismiss, but granted defendant's Motion to Transfer. On April 11, 1995, Petitioner filed a Petition for Writ of Mandamus or Other Supervisory Writ which the Fifth Circuit denied on April 17, 1995.

It is respectfully submitted that the Fifth Circuit, in denying Petitioner's Petition for Writ of Mandamus, allowed or permitted the District Court to exercise jurisdiction impermissibly over a matter asserted to be a Jones Act claim which the plaintiff initially chose to pursue in state court, allowed or permitted the district Court to use an inappropriate standard to adjudge the alleged fraudulent nature of the claim of Jones Act status, and allowed or permitted the District Court to improperly transfer this case to the federal court in New York, where, under 28 U.S.C.A., Section 1441(b), it could NOT have been removed by defendant in the first instance if it had been filed in New York state court.

I.

Under Rule 21 of the Rules of Appellate Procedure, mandamus is an extraordinary remedy available to confine a lower court to the lawful exercise of its lawful jurisdiction. *Sachs & Co., v. Edelstein,* 494 F.2d 76 (N.Y. 1974); *In Re Evans,* 524 F.2d 1004 (Miss. 1975).

Mandamus is an appropriate remedy to address the issue of whether, as in this instance, a district court has impermissibly attained and retained jurisdiction over a matter removed form state court (*Plekowski v. Ralston-Purina Co.,* 557 F.2d 1818 (5th Cir. 1977); *In Re Justices of the Supreme Court of Puerto Rico,* 695 F.2d 17 (1st Cir. 1982); *Town of North Bonneville, Washington v. United States District Court, Western District of Washington,* 732 F.2d 747 (9th Cir. 1984); *Commonwealth of Penn. v. Newcomer,* 618 F.2d 246, 248 (3rd Cir. 1980), or whether the district court has permissibly transferred a case to another district.

Sunshine Beauty Supplies v. United States District Court for the Central District of Calif., 872 F.2d 310 (9th Cir. 1989); *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982); *Caleshu v. Wangelin*, 549 F.2d 93 (8th Cir. 1977).

In this particular case, the Fifth Circuit, in summarily and without reasons denying Petitioner's Petition for Writ of Mandamus, which addressed directly the issue of the district court's jurisdiction of a removed cause of action and its failure to remand that action, abused its discretion and permitted the district court to exercise its jurisdiction over a matter improperly removed in violation of the Plaintiff's Jones Act rights, and compounded the improper exercise of jurisdiction by failing to order the matter remanded to the state court.

Authority for the proposition that this matter was improperly removed is evident in the district court's own Reasons for Judgment:

> Removal jurisdiction is strictly construed. When a plaintiff moves to remand for lack of jurisdiction, the burden of establishing original federal jurisdiction rests upon the defendant. *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 542 (5th Cir. 1990). Any doubts concerning the propriety of removal are resolved in favor of remand and state court jurisdiction. *York v. Horizon Federal Savings & Loan Association*, 712 F.Supp. 85, 87 (E.D. La. 1989).
>
> Jones Act suits may not be removed from state court. See *Lirette v. N.L. Sperry Sun, Inc.*,

> 820 F.2d 116, 117 (5th Cir. 1987) (en banc). To determine whether a Jones Act claim has been alleged, the Court's inquiry is usually limited to a review of the plaintiff's pleadings. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206 (5th Cir. 1993). When the removing party alleges that a Jones Act claim has been fraudulently pled, the Court may pierce the pleadings to determine whether the claim is baseless in law and fact. *Id.* The removing party bears the burden of proving that the Jones Act claim was fraudulently pled, and any doubts are resolved in favor of the plaintiff. *Id.*

The burden of proof is upon the defendant to establish that the allegations of the Jones Act complaint were fraudulently made. Any doubts should be resolved in favor of the plaintiff. As the Court noted in *Lackey*, supra:

> Defendants must prove that the allegations of the complaint were fraudulently made, and any doubts should be resolved in favor of the plaintiff. As in fraudulent joinder cases, defendants' burden of persuasion is a heavy one. The district court must resolve disputed questions of fact from the pleadings and affidavits in favor of the plaintiff. ... The removing party must show that there is *no possibility* that plaintiff would be able to establish a cause of action. ... The court must resolve all disputed questions of fact from the pleadings and affidavits in favor of the plaintiff, and then determine whether there could possibily be a valid claim against the defendant in question. (Emphasis added) 990 F.2d at 207-208.

Plaintiff initially chose, under the savings-to-suitors clause (28 U.S.C.A. Section 1333), to assert her Jones Act

claim in state court. In removing this action and alleging that plaintiff fraudulently asserted her Jones Act status, defendant has a "heavy burden of persuasion to meet" if plaintiff is to be denied her procedual rights under the Jones Act to choose her forum. The district court must preclude every possibility that plaintiff could establish her Jones Act status before the court can deny plaintiff's Motion to Remand. The district court in this instance viewed the facts in one light only and failed to analyze those facts favorable to plaintiff's position with a view of whether the possibility of Jones Act status might exist. For example:

1. The court in finding Dr. Anderson to be a passenger, noted that "rather than pay a cash fare for her passage, plaintiff agreed to give several lectures during the trip. With this agreement came *certain limited duties,* but in all other respects she was treated as a passenger." (Emphasis added). However, the court failed to discuss the very duties that distinguished plaintiff from the passengers aboard the vessel and determine whether these duties might possibly create a Jones Act claim. Moreover, in brushing aside these aspects of plaintiff's work and status on the vessel as "certain limited duties", the court failed to address whether the very items that made plaintiff different from all the passengers aboard the vessel may be the very items that, at the least, create the possibility of Jones Act status.

2. The court interpreted Dr. Anderson's factual situation as one of a person traveling in a public conveyance, paying something accepted as an equivalent of fare rather than that of a person whose presence aboard the vessel was sought by the vessel itself, benefited the pur-

pose of the cruise, was used as an advertising device by the cruise owner to attract paying passengers, and who was herself *paid* by the cruise owner in the form of a free cruise in exchange for her services rendered to and for the vessel.

In short, was plaintiff a passenger paying for her cruise by performing lectures and other duties aboard the vessel, or was she a recruited Jones Act seaman paid in lieu of wages with a free cruise? The court considered only the former possibility. Plaintiff would respectfully submit that the latter arrangement at the least creates the possibility of a finding of Jones Act status.

Petitioner would respectfully submit that when analyzing the Writ of Mandamus addressed to the District Court's jurisdiction over plaintiff's claim, the Fifth Circuit improperly failed to grant the writ to correct a clear abuse of the district court's jurisdiction, that is, assuming and retaining jurisdiction of a matter filed in state court as a Jones Act claim, on the district court's failure to exclude any and all possibility of a finding of Jones Act status.

Moreover, neither the District Court, in assuming jurisdiction of the removed action, or the Fifth Circuit made any finding that the state court, where the action was originally filed, was unable intellectually or otherwise to undertake the same Jones Act analysis undertaken by the District Court. In short, there was no showing that the state court was not equipped or able to determine the validity of plaintiff's Jones Act claim. Instead, the federal court assumed jurisdiction based on diversity in the removed action, refused plaintiff's Motion to remand, proceeded to analyze the validity of plaintiff's Jones Act claim, and ultimately transferred this matter to the federal court in

New York where, because Cunard is a New York citizen, the action could not have been removed in the first instance if filed in New York state court (28 U.S.C.A. Section 1441(b)).

These actions have effectively denied Plaintiff/Petitioner her rights under the savings-to-suitor clause to choose her forum for her Jones Act claim. It would seem that in an alleged Jones Act claim filed in state court, a defendant need only find or allege another basis of federal jurisdiction, assert that the Jones Act claim is fraudulent, remove the case to federal court, and thereafter deny or deprive the state court the opportunity to make its own determination of whether the Jones Act claim is appropriate.

Petitioner would respectfully assert that this procedure denies plaintiff her right to argue the validity of her Jones Act claim in the state court forum she has chosen. The matter can thereafter be removed if the state court determines that the Jones Act claim is fraudulent. However, in this case, the federal court has taken the case from the state court and proceeded to rule on the Jones Act issues, without any determination that the state court could not conduct a similar analysis and without eliminating any and all possibility of an ultimate finding of Jones Act status.

II.

For the reasons stated hereinabove, Petitioner would respectfully submit that the Court of Appeals erred in denying the Petition for Writ of Mandamus, which denial left

unaddressed the District Court's refusal to remand the proceedings back to state court where defendant would have had ample opportunity to fully pursue and agree their assertion of lack of Jones Act status.

CONCLUSION

1. In denying the Petition for Writ of Mandamus, the Fifth Circuit Court of Appeals allowed and permitted the District Court to assume jurisdiction over an alleged Jones Act claim filed in state court under the saving-to-suitors clause of 28 U.S.C.A. Section 1333, in violation of plaintiff's rights under the Jones Act to pursue such a claim in a state court tribunal. There was no finding or even suggestion that the state court was not qualified to undertake an analysis of plaintiff's Jones Act status or that defendant could not fully pursue in the state court proceeding its claim that plaintiff was not a Jones Act seaman.

2. In denying the Petition for Writ of Mandamus, the Fifth Circuit Court of Appeals failed to remedy the error of the District Court which concluded Petitioner was not a Jones Act seaman based upon an analysis that did not eliminate any and all possibility that Petitioner might be deemed to be a Jones Act seaman.

3. The Fifth Circuit Court of Appeals erred in denying the Writ of Mandamus in order to remedy the District Court's error in refusing to remand this action to the state court where Petitioner had a right to file it and have her claims adjudicated and the error in transferring this case to the federal court in New York where it could not have been

removed if plaintiff had filed her claim initially in New York state court.

Respectfully submitted,
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
Apr 17 1995

No. 95-30350
(CA95-0249-R)

IN RE: BARBARA ANDERSON,
Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

APPENDIX B

MINUTE ENTRY
VANCE, J.
MARCH 28, 1995

Filed
Mar 31 95

BARBARA ANBDERSON — CIVIL ACTION

VERSUS — NO. 95-249

CUNRAD LINE LIMITED — SECTION "R"

ORDER DENYING PLAINTIFF'S MOTION TO REMAND AND GRANTING DEFENDANT'S MOTION TO TRANSFER

This matter is before the Court on plaintiff Barbara Anderson's Motion to Remand and defendant Cunard Line Limited's Motion to Transfer and/or Dismiss. The motions were set for hearing on March 8, 1995, but were submitted on the briefs. For the reasons stated herein, plaintiff's Motion to Remand is DENIED, and defendant's Motion to Transfer is GRANTED.

I. BACKGROUND

Plaintiff is a Professor Emeritus at Southern Methodist University in Dallas, Texas. In 1994, Cunard Lines offered to provide plaintiff with free passage and meals for two cruises aboard the M/V VISTAFJORD. In exchange, Dr. Anderson was asked to give topical lectures to passengers on board the cruise ship. Under the terms of the arrangement, plaintiff was not compensated monetari-

ly for her services. Nor was she be reimbursed for incidental expenses, including travel to and from the vessel, gratuities, laundry, or dry cleaning.

Defendant provided plaintiff with boarding tickets for each cruise. The tickets were designated "Passenger Ticket & Passenger Coupon" and issued subject to the terms and conditions issued in the tickets. Article 22 of the terms and conditions contained the following clauses:

> (a) This passage contract applies to claims, suits and litigation of any kind against the Company "in personam" or the vessel "in rem" or otherwise.
> (b) It is agreed by and between the passenger(s) and the Company that any and all disputes and matters whatsoever arising under, in connection with, or incident to the Passage Contract shall be litigated, if at all, in and before any court located in the City of New York, State of New York, U.S.A., to the exclusion of the courts of any other city, state or country.

Other articles in the tickets addressed Cunard's liability in the event of death, injury, or property damage to the holder of the passenger ticket. In accordance with the ticket, Dr. Anderson was registered as a passenger on the ship's manifest and passenger list.

During both cruises, plaintiff was assigned to a passenger stateroom. She was also provided with an information sheet for embarking lecturers. The information sheet advised plaintiff, among other things, that she was

expected to attend a meeting with the cruise staff, that she would eat in the passenger dining room, that she would be given a daily program setting the time and place of her lectures, and that she was not to gamble. The information sheet also "reminded" plaintiff that she was to cater to passengers whenever possible during the course of the cruise.

However, unlike members of the ship's crew, plaintiff was not required to obtain seaman's papers prior to either cruise or sign the ship's articles upon boarding. She was not required to undergo a physical examination or drug screening. Her quarters were not subject to inspection, and she was not required to fill out a W2 tax form. Moreover, although Dr. Anderson was obviously expected to attend her lectures, she was not required to report her whereabouts to the ship's captain during the cruise or request shore leave when the ship docked.[1] Rather, like all other passengers, plaintiff was free to come and go as she pleased.

On May 14, 1994, plaintiff injured her leg in an accident on board the vessel. Her injuries were initially treated on board by the ship's physician. The physician documented his treatment and filed plaintiff's medical records with the medical records of the other ship passengers. After the cruise ship reached a Greek port, plaintiff went ashore for medical treatment. She was not asked to complete, nor did she request, the documents required to be filled out when a member of the ship's crew re-

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[1] Dr. Anderson gave a total of seven lectures for Cunard. The time and place of the lectures were advertised to the ship's passengers.

quests leave to seek medical treatment.

Plaintiff's complaint alleges that the defendant is liable under the Jones Act and general maritime law for her injuries. Plaintiff filed this action in Louisiana state court in Orleans Parish on November 18, 1994.[2] On January 20, 1995, defendant removed the case to this Court, claiming diversity of citizenship and that plaintiff could not state a cause of action under the Jones Act. Plaintiff now moves to remand the action. Defendant opposes plaintiff's motion, and seeks to have the action transferred to the United States District Court for the Southern District of New York or dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6).

II. DISCUSSION

Removal jurisdiction is strictly construed. When a plaintiff moves to remand for lack of jurisdiction, the burden of establishing original federal jurisdiction rests upon the defendent. *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 543 (5th Cir. 1990). Any doubts concerning the propriety of removal are resolved in favor of remand and state court jurisdiction. *York v. Horizon Federal Savings & Loan Association*, 712 F. Supp. 85, 87 (E.D. La. 1989).

Jones Act suits may not be removed from state court. *See Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117 (5th Cir. 1987)(*en banc*). To determine whether a Jones Act claim has been alleged, the Court's inquiry is usually limited to a review of the plaintiff's pleadings. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206 (5th Cir. 1993).

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[2] Plaintiff has a parallel action currently pending in a state court in New York.

When the removing party alleges that a Jones Act claim has been fraudulently pled, the Court may pierce the pleadings to determine whether the claim is baseless in law and fact. *Id.* The removing party bears the burden of proving that the Jones Act claim was fraudulently pled, and any doubts are resolved in favor of the plaintiff. *Id.*

In its notice of removal, the defendant submitted that there is no possibility that the plaintiff can establish a cause of action under the Jones Act because she is not a seaman. It is well established that a plaintiff has standing to sue under the Jones Act only if: (1) she was permanently assigned to a vessel or performed a substantial part of her work on the vessel; and (2) she was employed in a capacity or performed duties which contributed to the function of the vessel or to the accomplishment of its mission. *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 438 (5th Cir. 1991). Dr. Anderson does not meet the first part of the test because she was not assigned permanently to the M/V VISTAFJORD, nor did she perform a substantial amount of her work on the vessel. Rather, plaintiff was a passenger who was traveling aboard the M/V VISTAFJORD pursuant to a contract for carriage with the defendant.

Like other passengers on board the cruise ship, Dr. Anderson was not on board the vessel to earn money. She was on board to take a pleasure trip to Greece. Rather than pay a cash fare for her passage, plaintiff agreed to give several lectures during the trip. With this agreement came certain limited duties, but in all other respects she was treated as a passenger. She ate with the passengers, slept in a passenger stateroom, was listed on the passenger list

and manifest, and was issued a passenger ticket. Plaintiff was not required to report her whereabouts to the ship's personnel and was free to come and go as she pleased. Plaintiff did not sign the ship's articles. She did not obtain seaman's papers. When she was injured, she was treated as an injured passenger and not as an injured crew member.

A passenger has been traditionally defined as "one who travels in a public conveyance by cirtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent therefor." *Rutledge v. A & P Boat Rentals, Inc.*, 633 F. Supp. 654, 656 (W.D. La. 1986). In this case, plaintiff and defendant agreed between themselves that in substitution of a cash payment for the cxruise tickets, plaintiff would provide seversl lectures. Plaintiff's transitory connection with the vessel also distinguishes her from members of the ship's crew, e.g., waiters, musicians, and bartenders, who while not performing the duties of a traditional seaman, would nonetheless qualify as such.

In sum, the Court concludes that plaintiff was a passenger on board the cruise ship M/V VISTAFJORD, and therefore has no standing to bring an action under the Jones Act. *See Rutledge*, 633 F. Supp. at 656 (holding that plaintiff who cooked breakfast on board vessel on one occasion did not meet "substantiality prong" of seaman's test); *Steuer v. N.V. NEDERL-AMERIK*, 362 F. Supp. 600 (S.D. Fla. 1973) (holding that clergy was a passenger when he received free passage for providing two religious services); *see also Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437 (5th Cir. 1991)(holding that public relations agent for vessel was not a seaman); *Craig v. M/V*

PEACOCK, 760 F.2d 953 (9th Cir. 1985)(holding that scientific personnel on oceanographic research vessel were not seamen); *Bullis v. Twentieth Century Fox,* 474 F.2d 392 (9th Cir. 1973)(holding that film extras on mock-up battleship were not seamen because of transitory connection with vessel). Since plaintiff cannot maintain an action under the Jones Act, she cannot rely on its provisions to support her motion to remand. Plaintiff has not challenged defendant's assertion that this Court has diversity jurisdiction over the case in the absence of a Jones Act claim. The Court thus finds that the case was properly removed, and plaintiff's motion to remand is denied.

Having determined that federal subject matter jurisdiction exists, the Court must now consider the merit of defendant's motion to transfer this case to the United States District Court for the Southern District of New York. Defendant asserts that the case should be transferred in light of the forum selection clause in the newspaper ticket provided to Dr. Anderson. The Supreme Court has held that forum selection clauses, such as the one found in plaintiff's ticket, are enforceable if they are fundamentally fair. *Carnival Cruise Lines v. Shute,* 499 U.S. 585, 111 S.Ct. 1522 (1991). Plaintiff contends that enforcement of the forum selection clause would be unfair because she was not accorded the rights and privileges of the other passengers. The Court has already rejected this argument. Moreover, considering that plaintiff has already filed a suit in New York state court based on the same facts, there is no reason to believe that the contractual forum would cause her serious inconvenience or that she is physically or financially incapable of pursuing this litigation in New York. To give effect to the forum selection clause, the Court must

transfer this case to the United States District Court for the Southern District of New York. Accordingly.

IT IS ORDERED that plaintiff's Motion to Remand is DENIED.

IT IS FURTHER ORDERED that this matter be and is hereby TRANSFERRED to the United States District Court for the Southern District of New York.

(2)

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

No. 95-101

In The

Supreme Court of the United States

October Term, 1995

BARBARA ANDERSON, Ph.D.,

Petitioner,

versus

CUNARD LINE LIMITED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Are issues of federal jurisdiction and removal to be determined by federal courts or state courts?

II. Did the lower courts properly deny petitioner's motion to remand when the established facts showed her claim of Jones Act status was baseless in law and fact and therefore fraudulent?

III. Was the case properly transferred to the United States District Court for the Southern District of New York?

LIST OF PARTIES

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 8

REASONS FOR DENYING THE WRIT 9

ARGUMENT 10

I. Removal jurisdiction is determined by federal courts, not state courts 10

II. The District Court and the Court of Appeals correctly rejected as factually and legally groundless the petitioner's claim of Jones Act status consistent with the standards established by this Court 12

III. The district court correctly transferred this matter to the United States District Court for the Southern District of New York 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

American Dredging Co. v. Miller, 510 U.S. ___, ___ S.Ct. ___, 127 L. Ed. 2d 285 (1994) 6

Chandris, Inc. v. Latsis, ___ U.S. ___, 115 S.Ct. 2172 (1995) 7, 8, 9, 13, 15

Kansas Public Emp. Ret. System v. Reimer & Koger, 4 F.3d 614, (8th Cir. 1993) cert. den'd 114 S.Ct. 2132 (1994) 11

Lackey v. Atlantic Richfield Co., 990 F.2d 202 (5th Cir. 1993) 7, 12

Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) 13, 15

Palmer v. Fayard Moving & Transportation Corp., 930 F.2d 437 (5th Cir. 1991) 7, 15

Rutledge v. A.P. Boat Rentals, Inc., 633 F. Supp. 654 (W.D. La. 1986) 12

Steuer v. Nederl-Amerik Stoomvaart Maatschappf, 362 F. Supp. 600 (S.D. Fla. 1973) 14, 15

STATUTES

28 U.S.C. § 1332 ..... 2, 11

28 U.S.C. § 1404 ..... 2, 8, 16

28 U.S.C. § 1441 ..... 2, 11

28 U.S.C. § 1446 ..... 2, 11

28 U.S.C. § 1447 ..... 2, 11

46 U.S.C. § 688 et seq. 2, 6

OTHER

Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, § 5-5, at 169 (2d ed. 1994) 12

No. 95-101

In The

Supreme Court of the United States

October Term, 1995

BARBARA ANDERSON, Ph.D.,

Petitioner,

versus

CUNARD LINE LIMITED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully urges the Court to deny the petition for writ of certiorari as there is no error in the proceedings below.

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit affirmed both the district court's denial of petitioner's motion to remand after respondent had removed the case on the basis of diversity jurisdiction to the Eastern District of

Louisiana and the district court's granting of respondent's motion to transfer the case to the Southern District of New York.

Both lower court decisions are reproduced in the Appendix to petitioner Anderson's Petition for Certiorari (App. A, A-1; App. B., A-2 to A-9).

JURISDICTION

Respondent does not contest petitioner's statement regarding this Court's jurisdiction. The jurisdiction of the district court was based on the diversity of citizenship of the parties and jurisdictional amount.

STATUTES INVOLVED

The statutes in issue are 28 U.S.C. § 1332 (federal diversity jurisdiction); 28 U.S.C. §§ 1441, 1446 and 1447 (removal); 46 U.S.C. § 688 et seq. (the Jones Act); and 28 U.S.C. § 1404 (change of venue).

STATEMENT OF THE CASE

I. Relevant Uncontested Facts

Southern Methodist University Professor Emeritus of Anthropology, Dr. Barbara Anderson, age 73, filed a petition for damages in Louisiana state court to recover for a personal injury allegedly sustained on May 14, 1994, the

day after she came aboard the cruise ship M/V VISTAFJORD.[1] In the state court petition, Anderson claimed that she was a seaman and a member of the crew of the vessel, an allegation that the United States District Court for the Eastern District of Louisiana found, after respondent removed the case to that court, was a fraudulent claim made solely to defeat the exercise of federal jurisdiction.

Professor Anderson arranged to take a cruise aboard VISTAFJORD in exchange for giving a few anthropology lectures. Cunard encourages such arrangements because they enhance the cruise experience of its customers and because they allow semi-retired or retired clergy and academics, like Professor Anderson, to participate in recreational activities and visit countries which they might otherwise find unaffordable. Under the terms of the arrangement, Professor Anderson was not compensated monetarily for her services and was not reimbursed for incidental expenses, including travel to and from the vessel, gratuities, laundry, or drycleaning.

Cunard provided Professor Anderson with boarding tickets for each of the two cruises on which she sailed. The tickets were designated "Passenger Ticket and Passenger Coupon" and were issued subject to the terms and conditions printed on the tickets. Article 22 of the terms and conditions contained the following clauses:

> (a) This passage contract applies to claims, suits and litigation of any kind against the

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[1] Despite her alleged injury, Professor Anderson remained aboard the VISTAFJORD until the conclusion of her cruise on May 27, 1994.

Company "in personam" or the vessel "in rem" or otherwise.

(b) It is agreed by and between the passenger(s) and the Company that any and all disputes and matters whatsoever arising under, in connection with, or incident to the Passage Contract shall be litigated, if at all, in and before any court located in the City of New York, State of New York, U.S.A., to the exclusion of the courts of any other city, state or country.

In accordance with the ticket, Professor Anderson was registered as a passenger on the ship's manifest and passenger list. Professor Anderson slept in a passenger state room, not crew quarters. She ate in the passenger's dining room, not the crew mess. Professor Anderson did not have to stand 8 hours of navigation watch or work the 8 - 10 hour daily shifts (not including overtime) required of VISTAFJORD crewmembers. Like all other passengers, Professor Anderson was not required to report her whereabouts to the ship's captain or officers during the cruise, and was free to come and go as she pleased while in port. Unlike crewmembers, she was not required to request "shore leave" or "liberty" from VISTAFJORD's master.

Unlike members of the ship's crew, Professor Anderson was not required to obtain seaman's papers prior to the cruise or to sign the ship's articles upon boarding. She was not required to undergo a physical examination or drug screening. Cunard did not pay her travel expenses to or from VISTAFJORD, as it did for members of the crew. Her quarters were not subject to inspection, and she was not required to fill out a W-2 tax form. She did not

have free laundry service. After the alleged accident, Professor Anderson did not request a "hospital ticket" or follow any of the procedures required of crewmembers for medical treatment ashore.

Professor Anderson introduced in proceedings below her "guest-lecturer information sheet," which established the following uncontested facts:

(a) Cruise staff assistants were assigned to Professor Anderson and to the other passengers, but *not* to VISTAFJORD crewmembers;

(b) Professor Anderson and the other passengers were expected to tip their passenger dining room waiters and passenger stateroom steward/stewardess; VISTAFJORD crewmembers do *not* tip one another;

(c) Professor Anderson and the other passengers were under the special care and attention of the cruise director, unlike VISTAFJORD crewmembers; and

(d) Professor Anderson lectured only seven times, from 1 - 2 hours each, during the fifteen days she was aboard the vessel.

It is also uncontested that Professor Anderson was not required to conduct tours ashore. The only restriction on her activity was that she could not gamble on board. Also, Cunard expressly expected Anderson and others like her to be polite to other passengers. In sum, petitioner received free cruise passage and meals in exchange for her giving a few anthropology lectures to other passengers.

II. Proceedings Below

About six months after her second cruise ended, petitioner filed a Jones Act (46 U.S.C. § 688, *et seq.*) personal injury claim against respondent in Louisiana state court. This petition was served on Cunard at its New York City office pursuant to the Louisiana Long Arm Statute on December 21, 1994.[2] On January 20, 1995, Cunard timely removed the case to the United States District Court for the Eastern District of Louisiana on the basis of diversity of citizenship and requisite jurisdictional amount.

Anderson has never contested the fact the parties are indeed of diverse citizenship or that the case was properly removable, except on the basis of her claim of Jones Act seaman status. In the removal notice, Cunard specifically alleged that Anderson's Jones Act claim was fraudulently pled for the purpose of thwarting removal. On January 23, 1995, Anderson filed in New York state court a complaint virtually identical to the Louisiana petition, seeking $500,000 in damages. In that action, she conceded

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[2] This case substantiates the forum-shopping concerns of Justices Kennedy and Thomas in their dissent in *American Dredging Co. v. Miller*, 510 U.S. ___, ___ S.Ct. ___, 127 L. Ed. 2d 285, 303, 305-7 (1994) because there is no connexity between the facts of this case and the state of Louisiana. Professor Anderson was and is a Texan. The alleged injury occurred in Greece. Cunard is a foreign corporation which does not maintain an office in Louisiana. Plaintiff's medical treatment was in Greece and near her home in Dallas, Texas. None of the potential witnesses in this case is a Louisiana citizen. The only reason Louisiana was selected by Anderson was some perceived benefit to having her claim adjudicated before the courts of that state.

she was a passenger if she were ultimately found not to be a Jones Act seaman.

On February 14, 1995, Anderson filed a motion to remand with the district court, alleging that her claim of Jones Act seaman status precluded removal of her claim to federal court. Cunard filed a motion to dismiss and/or transfer Anderson's case on February 16, 1995. The motions (with appended memoranda, affidavits and documentary evidence) were consolidated for hearing on March 8, 1995, but by agreement were submitted on briefs.

On March 31, 1995, the district court denied petitioner's motion to remand because the uncontested facts established Anderson was not a Jones Act seaman but was instead simply a passenger. The district court in Louisiana also transferred the case to the United States District Court for the Southern District of New York.

The district court recognized that in the removal context Cunard had the burden of proving Anderson's Jones Act claim was fraudulently pled. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206-207 (5th Cir. 1993). The district court reviewed the evidence submitted by the parties, which was not in conflict, and applied the Jones Act status test set forth in *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 438-439 (5th Cir. 1991) and which was recently cited with approval by this Court in *Chandris, Inc. v. Latsis*, ___ U.S. ___; 115 S.Ct. 2172, 2189, 2191 (1995).[3] After careful consideration, the district court

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[3] The district court and Fifth Circuit anticipated this Court's recent decision in *Chandris*, flatly rejecting the "voyage

determined the uncontested facts established Anderson's Jones Act claim was fraudulent.

In granting respondent's motion to transfer pursuant to 28 U.S.C. § 1404, the district court noted that New York was the more convenient forum for the parties, there being no contact whatsoever with Louisiana, and that New York was the forum designated in Anderson's "Passenger Ticket and Passenger Coupon" as the only one in which disputes of this type could be brought.

Rather than appeal, Anderson filed a petition for a writ of mandamus with the Court of Appeals for the Fifth Circuit. After considering Anderson's arguments, the same arguments that she urges here, the appellate court denied Anderson's petition on April 17, 1995.

Anderson now asks this Court to disregard its own jurisprudence and ignore both well-settled jurisprudence of the lower courts and federal legislation concerning jurisdiction, removal and venue. Petitioner would, in effect, have the judiciary of the several states decide in the removal context the breadth of jurisdiction which a federal court could lawfully exercise. This extraordinary argument has no basis in law or fact.

SUMMARY OF THE ARGUMENT

Petitioner's assertion of a Jones Act claim is totally inconsistent with the uncontested facts concerning her

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test" urged by Anderson below. *Chandris*, 115 S.Ct. at 2187. Anderson does not reurge her "voyage test" argument here.

passage on the VISTAFJORD. She was simply a passenger on the vessel, and her claim of seaman status was fraudulent as a matter of law. The lower courts properly applied the seaman status analysis mandated by this and other courts in a long line of cases ending with the Court's recent ruling in *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172 (1995). Petitioner's assertion that the question of seaman status should have been decided by the state court, not the federal district court to which the case had been removed, would effectively allow the state court to determine the scope of federal jurisdiction. Finally, petitioner's suggestion that the district court erred in transferring the case is not only unsupported by any legal authority, but also ignores the plain wording of the federal statute dealing with change of venue.

REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. That is, the case involves no point of law which is in conflict amongst the federal circuit courts, and the decision below is in accord with Supreme Court precedent. Further, the facts in this proceeding are sufficiently unique that the precedential value of the case is likely to be minimal.

Although petitioner alleges legal error by the courts below, the petition for certiorari fails to cite *any* Jones Act removal or seaman status case which conflicts with the holding in the case at bar. Similarly, petitioner offers no authority in support of her novel argument that a federal

court must make a specific factual finding that a state court is "intellectually incapable" of a Jones Act status analysis before the federal court may exercise federal jurisdiction and confirm the removal of a case from state court. The practical result of the ruling petitioner advocates would be to vest with the state courts the authority to determine when claims of questionable, indeed fraudulent, Jones Act seaman status could be removed to federal court, directly contrary to the statutory scheme and the policy considerations underlying the removal statute.

Finally, Anderson asks the Court effectively to ignore the federal change of venue statute, which specifically authorizes the district court to transfer the case to another district as the interests of justice and the convenience of the parties require.

ARGUMENT

I. Removal jurisdiction is determined by federal courts, not state courts.

Petitioner cites no authority in support of her assertion that state courts rather than federal district courts should determine the scope of federal removal jurisdiction. This indeed would be the practical result of her argument that federal courts should defer to state courts to determine questions of fraudulent claims of Jones Act seaman status unless the federal court makes a specific finding that the state court where the action was originally filed, " . . . was unable, intellectually or otherwise, to undertake the same Jones Act analysis undertaken by

the District Court."[4] This dearth of authority is hardly surprising in light of the novelty of the argument. Contrary authority abounds.

There is no question but that the district court has original jurisdiction of this case in light of the diverse citizenship of the parties and the jurisdictional amount having been satisfied. 28 U.S.C. § 1332 (1993). It is similarly elementary that the removal statue, 28 U.S.C § 1441 (1993), authorizes removal from state court of any civil action of which the federal district courts have original jurisdiction, unless, as with legitimate Jones Act claims, there is a Congressional mandate to the contrary. It also cannot be disputed that, by statute, it is the federal court, *not* the state court, which considers any motion to remand and determines whether removal was proper. 28 U.S.C. §§ 1446, 1447 (1993).[5]

Finally, it is well-settled that when a Jones Act claim has been fraudulently pled in state court to defeat removal, the *federal* court may pierce the pleadings to

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[4] In making this argument, petitioner asks this court to overlook the strict time requirements of the removal statute which require defendant to remove the case within 30 days after the state court petition is served. There can be no guarantee that a state court would decide disputes concerning seaman status within 30 days.

[5] See, e.g., *Kansas Public Emp. Ret. System v. Reimer & Koger*, 4 F.3d 614, 618-619 (8th Cir. 1993) cert. den'd 114 S.Ct. 2132 (1994) (whether case is removable is question of federal law to be decided by federal courts; state legislature and judiciary cannot defeat the congressionally conferred right to remove a case from state court to federal court; federal courts should not condone procedure intended to prevent removal).

determine whether the claim is baseless in law and fact. See, e.g., *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206-207 (5th Cir. 1993). These federal statutes and precedents are clear. They vest with the federal courts, not the state courts, the authority to determine the scope of federal jurisdiction in the removal context. To hold otherwise would thwart the essential policy consideration underlying the diversity and removal statutes – to make a federal forum available to a non-resident defendant who may be exposed to local prejudice in a state court.

Because the relevant statutes are so clearly and irreconcilably at odds with the relief petitioner seeks, her claim should be rejected as totally without merit.

II. The District Court and the Court of Appeals correctly rejected as factually and legally groundless the petitioner's claim of Jones Act status consistent with the standards established by this Court.

A passenger is "one who travels in a public conveyance by virtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent therefor." *Rutledge v. A.P. Boat Rentals, Inc.*, 633 F. Supp. 654, 656 (W.D. La. 1986); *Thomas J. Schoenbaum*, ADMIRALTY AND MARITIME LAW, § 5-5, at 169 (2d ed. 1994). Prior to the voyage in question, petitioner and respondent agreed that in lieu of a cash payment for the cruise tickets, petitioner would give several anthropology lectures to other passengers. By definition, then, Anderson was a passenger aboard M/V VISTAFJORD since she gave something of value in exchange for her passage. One cannot be a passenger and a member of the crew at

the same time, so Anderson's claim of seaman status must fail.

Not only do the facts of record show Anderson was simply a passenger, but also they show with equal force that she was not a seaman. The test of Jones Act seaman status is whether Anderson had a more or less permanent connection with the vessel that was substantial in terms of both its duration and its nature. *Chandris, supra,* 115 S.Ct. at 2190. The "connection" Anderson had with VISTAFJORD was essentially that of every other passenger. She was aboard to take a pleasure trip , like every other passenger, but, unlike them, she paid for her fare by agreeing to give lectures during the course of the voyage. While petitioner would have the performance of these lectures in lieu of payment of a passenger fare give rise to an employment relationship and to seaman status, she fails to cite to the Court a single case in which such a result was reached. In fact, Anderson fails to cite any status case whatsoever, which points up the weakness of her argument that the district court erred in concluding that her allegation of seaman status was fraudulent.

In contrast, the leading Jones Act status cases[6] each involve fact situations which point up the fallacies of petitioner's claim. For example, each of the leading status cases involve workers, whether traditional or non-traditional crewmembers, whose presence aboard the vessel is incidental to their earning wages. It is uncontested that

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[6] *Chandris; Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959) and their progeny.

Professor Anderson did not earn wages aboard VISTAFJORD, unlike members of the crew, but simply exchanged her lectures for a vacation cruise. Similarly, there are no indicia in this case of the employer/employee relationship that is an absolute prerequisite to a finding of Jones Act status.

Further, Anderson's argument regarding seaman status was made and rejected over twenty years ago in *Steuer v. Nederl-Amerik Stoomvaart Maatschappf*, 362 F. Supp. 600 (S.D. Fla. 1973), the only other reported case dealing with a claim of seaman status by a passenger who was given a free cruise in exchange for performance of certain limited services. In that case, a retired clergyman obtained free passage aboard a cruise vessel in exchange for conducting religious services. After he suffered a heart attack, he brought suit to recover maintenance, cure and repatriation expenses, to which only seamen are entitled. The court applied the *Robison* seaman status test and held that the clergyman was a passenger, not a seaman. *Steuer*, 362 F. Supp. at 602-604. Indeed, the court specifically held that: "To conclude that Rabbi Steuer was a seaman would be an impossible strain on the imagination and would defy not only the law, but common sense." *Id.* at 605.

As in *Steuer*, Professor Anderson was assigned to a passenger stateroom, not crew quarters. Professor Anderson ate in the passenger dining room, not the crew mess. She did not have to stand eight hours of navigation watch or work the 8-10 hour daily shifts (not including overtime) required of VISTAFJORD crewmembers. Unlike crewmembers, Professor Anderson could freely go ashore in port and was not required to request "shore leave" or

"liberty" from VISTAFJORD's master. Except for the expectation that Professor Anderson would conduct anthropology lectures (like Rabbi Steuer's religious services), Professor Anderson was in all respects a passenger.

Contrary to Anderson's assertions, the district court carefully considered and discussed all aspects of Anderson's presence aboard the VISTAFJORD, including her "limited duties" (to give lectures, be considerate of other passengers and not to gamble) in the context of the Jones Act status test set forth in *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 438-439 (5th Cir. 1991) and recently cited with approval in *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172 (1995).[7] On the basis of these authorities, the courts below held that giving lectures during a brief vacation cruise does not transform a passenger into a Jones Act seaman. Anderson's claim to the contrary, being totally without support in the jurisprudence, was properly rejected.

III. The district court correctly transferred this matter to the United States District Court for the Southern District of New York.

Although petitioner does not enumerate as an issue presented to the Court the propriety of the transfer of the case to New York, petitioner does argue in the text and in

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[7] The *Chandris* and *Palmer* status test is in pertinent part the same as the Fifth Circuit applied in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), which the district court in *Steuer* also applied.

the conclusion of her brief that it was error for the district court to do so. This argument, to the extent it is properly before the Court, is also without merit.

The federal venue statute, 28 U.S.C. § 1404(a), specifically states that a district court may transfer any civil action to any other district where it might have been brought. There is no dispute, and could be no dispute, that petitioner could have brought her action in the United States District Court for the Southern District of New York.

Although it is not made entirely clear, petitioner seems to argue that the court in the Eastern District of Louisiana should not have transferred the case to the Southern District of New York since, if petitioner had filed her initial lawsuit in New York state court, respondent could not have removed the action to New York federal court. Petitioner's claim that such a New York state court action could not have been removed is not explained in her petition, but is presumably based on her wrongful assertion that Cunard is a New York citizen. There is nothing in the record to this effect, and the assertion is simply wrong since Cunard is a citizen of a foreign nation, the United Kingdom.

In any event, though, petitioner's argument is hypothetical and completely irrelevant since she chose to file this action in a Louisiana, not a New York, state court. Once she made that choice, federal statutes concerning removal and transfer controlled the case and mandated the conclusions reached by the courts below. The district court did not abuse its discretion, but merely followed

the clear dictates of the law by transferring the case to New York federal court.

CONCLUSION

In conclusion, Cunard prays that this Court deny petitioner Anderson's petition for writ of certiorari because the case presents no issue appropriate for the Court to review, and because the lower courts' holdings were not in error.

Respectfully submitted,

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